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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 919

THE FIFTH AVENUE BANK OF NEW YORK, AS TRUSTEE UNDER DECLARATION OF TRUST DATED OCTOBER 28, 1926, WITH HENRY H. WESTINGHOUSE,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

FREDERICK L. PEARCE,
Counsel for Petitioner.

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vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

The petitioner prays that a writ of certiorari issue to review the judgment of the Court of Claims of the United States entered on November 3, 1941 (R. 14).

Opinion Below.

The opinion of the Court of Claims (R. 9-13) is reported in 41 F. Supp. 428.

Jurisdiction.

The judgment of the Court of Claims was entered November 3, 1941. Jurisdiction is conferred on this Court by section 3 (b) of the Act of February 13, 1925, 43 Stat. 939, as amended by the Act of May 22, 1939, 53 Stat. 752.

Question Presented.

Whether, under a statute which makes the income-tax-recognizable portion of a gain or loss on the sale of capital assets dependent on the length of time those assets have been held, the holding period of assets acquired by a trust before, but sold by it after, the trust-grantor's death should be computed from the time of acquisition by the trust or from the date of death, the trust being revocable by the grantor up to the time of his death.

Statutes Involved.

The statutes involved are set forth in the Appendix, *infra,* pp. 8-11.

Statement.

The facts found by the Court of Claims (R. 6-8) are summarized briefly as follows:

The plaintiff is acting as trustee under a trust declaration executed in 1926 by the grantor, Henry H. Westinghouse (R. 6). The said Westinghouse until his death in 1933 was cotrustee with the plaintiff, but since that time the plaintiff has been the sole trustee (R. 6).

The trust declaration provided that the trustee or trustees should receive and hold the trust property, pay out the current income to the grantor during his lifetime and after his death to his widow, and upon the termination of the trust on the subsequent death of the widow distribute the corpus to certain individuals and charitable and educational corporations (R. 6). The grantor reserved the power to amend or revoke the trust by an instrument in writing up to the time of his death, at which time it was to become irrevocable, but the trust was never revoked (R. 6).

The grantor transferred certain securities to the trust at its creation in 1926, and from time to time thereafter

(R. 6). The trustees sold certain of the securities and reinvested the proceeds in other securities during the grantor's lifetime (R. 6). None of the trust corpus held by plaintiff as trustee at the time of the grantor's death ever became a part of the grantor's estate for administration by his executors (R. 6-7).

During the calendar year 1934 the plaintiff, as trustee, sold certain securities (capital assets) out of the trust corpus (R. 7). The trustee had acquired legal title to some of these securities by transfer from the grantor in 1927 and 1929, and to others by purchase in 1932 (R. 7). In computing, for income tax purposes, the profit realized on the sale of these securities, the value of the securities at the date of the grantor's death was properly offset against the selling price of these securities (R. 7).

If the period for which the plaintiff held these securities is computed (under section 117 (a) of the Revenue Act of 1934, Appendix, *infra*, pp. 8-9) from the date of the grantor's death in 1933, a higher percentage of the profit upon the sale is subject to tax than if the holding period is computed from the respective earlier dates when the trustee acquired legal title (R. 8). The plaintiff-trustee contended in the Court of Claims that the securities were held, within the meaning of the statute, from and after the earlier dates when it obtained legal title by transfer and purchase (R. 9). The Court of Claims held, to the contrary, that the plaintiff-trustee did not begin to hold the securities, in the statutory sense, until the grantor died, and ordered that the petition be dismissed (R. 12, 14).

Specification of Errors to be Urged.

The Court of Claims erred:

1. In holding that the period during which the securities in question were held began at the date of the grantor's

death rather than on the respective earlier dates when the plaintiff-trustee acquired legal title.

2. In failing to give judgment for the plaintiff.

Reasons for Granting the Writ.

1. The decision of the Court of Claims is in probable conflict with that line of decisions, exemplified by *Helvering* v. *City Bank Farmers Trust Company, Trustee,* 296 U. S. 85, 80 L. Ed. 62, and *Railroad Commission* v. *Chicago, Burlington & Quincy Railroad Company,* 257 U. S. 563, 66 L. Ed. 371, holding that courts are free to construe language, through resort to committee reports or otherwise, only where the meaning is doubtful, and may not interpret a statute contrary to the natural import of its terms, or to create an ambiguity. The pertinent statute [1] provides that the taxable percentage of the gain or loss on the sale of a capital asset should depend, in the case of a taxpayer other than a corporation, on the length of time the asset has been "held" by the taxpayer. The same section makes *explicit* provision for determining that a capital asset is "held" for a period other than the actual period held by the taxpayer in four special situations.[2] The plaintiff taxpayer "held" the securities in question, under any natural import of that word, from the several dates of acquisition as stated in the minority opinion (R. 13). The word "held" does not, as applied to the circumstances of this case, offer any ambiguity, and construction by reference to the conference report, involving another statutory provision, and to other language outside the statutory section under consideration, is, therefore, a departure from the rule of this Court in the cases cited above.

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[1] Section 117 (a) of the Revenue Act of 1934, Appendix, *infra,* p. 8.

[2] Section 117 (c) of the Revenue Act of 1934, Appendix, *infra,* p. 9.

2. The decision below is contrary to the essence of the decisions of this Court in *McFeely* v. *Commissioner,* 296 U. S. 102, 80 L. Ed. 83, and *Helvering* v. *Gambrill,* 313 U. S. 11, 85 L. Ed. 1155, especially when taken in their conjunctive effect.

In the *McFeely* case, this Court, in considering the holding period under the capital gain and loss provisions of an earlier, but similar, statute, refused "to enlarge or alter the connotation commonly ascribed to the word 'held' "[3] or "to depart from the plain meaning of the section in an effort to bring about a uniformity which it is claimed Congress intended but failed to express."[3] The Court decided that the property was held from a date other than the date for determining the basis saying that "Congress, had it desired to change the connotation of the word 'held', * * * could readily have done so."[3]

In the *Gambrill* opinion, this Court concluded, in regard to *purchased* assets, that the period of holding ran from "the date of purchase for property purchased by the trustees." In contrast, the Court of Claims has held, in regard to the securities purchased by the instant trustee in 1932, that the period of holding started at a later date (a "basis" date in 1933). Hence, the decision of the Court of Claims, at least as to the purchased securities, appears to be in conflict with the *Gambrill* decision.

Further, in the *Gambrill* case, this Court held that the holding period of capital assets received by a remainderman from a testamentary trust after an intervening life estate dated back to the testator's death prior to the date for determining the basis of those assets, and that " 'property held by the taxpayer' * * * embraces not only

[3] The quotations from *McFeely* v. *Commissioner,* 296 U. S. 102, appear at pages 108, 111, and 110, respectively.

full ownership but also any interest whether vested, contingent, or conditional."[4]

Taken together, the *McFeely* and *Gambrill* cases mean that the commencement of the holding period is not required to coincide with the date for "basis" purposes unless the statute clearly so specifies; and that the time during which a trust is revocable is not, merely because of revocability, to be excluded from the holding period. The Court of Claims, stating that the *McFeely* and *Gambrill* cases were not controlling since they considered language different from that involved here (R. 12), made the "basis" provisions of the statute and the revocability of the instant trust determinative of the issue. The doubt on this issue, evidenced below in the dissenting opinion (R. 13-14) and, to some extent, in the majority opinion (R. 10-11), is a doubt, not merely as to the correctness of the decision, but as to whether it conflicts with the cited decisions of this Court. That very doubt, in the light of the analysis of those decisions, indicates the probability of a conflict.

3. The question involved is important and the removal of the probable conflict of authority is necessary for the fair and orderly administration of the Federal income tax. The statutory provisions here involved have continued, in effect, so far as the point at issue is concerned, until the present time. There are likely many trusts affected by the decision below. The most recent figures show the total number of trusts administered by national banks alone at 153,902 and the total of such trust assets at $9,345,419,682.[5] While there appear to be no such figures on revocable, as distinguished from irrevocable trusts, the records of the instant petitioner show on November 30,

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[4] This quotation from *Helvering* v. *Gambrill*, 313 U. S. 11, appears at page 15.

[5] 78th Annual Report of the Comptroller of the Currency, 1940, page 142.

1941, the date of the most recent compilation, 56 revocable trusts, with a capital value of $8,091,000, out of a total of 789 trusts. If this ratio of 56 revocable trusts to 789 total trusts were applied to the foregoing national bank figures, there would be a total of about 10,923 revocable trusts administered by the national banks with a total value of about $663,299,572.81. And when the trusts administered by individuals and fiduciaries other than national banks are considered, the importance of the issue receives added emphasis.

WHEREFORE, it is respectfully submitted that this petition should be granted.

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February 3, 1942.

APPENDIX.

Statutes Involved.

Revenue Act of 1934, c. 277, 48 Stat. 683:

SEC. 113. Adjusted Basis for Determining Gain or Loss.

(a) BASIS (UNADJUSTED) OF PROPERTY.—The basis of property shall be the cost of such property; except that—

* * * * * * *

(5) PROPERTY TRANSMITTED AT DEATH.—If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death. For the purpose of this paragraph property passing without full and adequate consideration under a general power of appointment exercised by will shall be deemed to be property passing from the individual exercising such power by bequest or devise.

* * * * * * *

Sec. 117. Capital Gains and Losses.

(a) GENERAL RULE.—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income:

100 per centum *if the capital asset has been held for not more than* 1 year;

80 per centum if the capital asset has been held for more than 1 year but not for more than 2 years;

60 per centum if the capital asset has been held for more than 2 years but not for more than 5 years;

40 per centum if the capital asset has been held for more than 5 years but not for more than 10 years;

30 per centum if the capital asset has been held for more than 10 years.

(b) DEFINITION OF CAPITAL ASSETS.—For the purposes of this title, *"capital assets" means property held by the taxpayer* (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

(c) DETERMINATION OF PERIOD FOR WHICH HELD.—For the purpose of subsection (a)—

(1) *In determining the period for which the taxpayer has held property* received on an exchange there shall be included the period for which he held the property exchanged, if under the provisions of section 113, the property received has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as the property exchanged.

(2) *In determining the period for which the taxpayer has held property* however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

(3) *In determining the period for which the taxpayer has held stock or securities* received upon a distribution where no gain was recognized to the distributee under the provisions of section 112 (g) of the Revenue Act of 1928 or

the Revenue Act of 1932, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution.

(4) *In determining the period for which the taxpayer has held stock or securities* the acquisition of which (or the contract or option to acquire which) resulted in the nondeductibility (under section 118 of this Act or section 118 of the Revenue Act of 1928 or the Revenue Act of 1932, relating to wash sales) of the loss from the sale or other disposition of substantially identical stock or securities, there shall be included the period for which he held the stock or securities the loss from the sale or other disposition of which was not deductible.

(d) LIMITATION ON CAPITAL LOSSES.—Losses from sales or exchanges of capital assets shall be allowed only to the extent of $2,000 plus the gains from such sales or exchanges. If a bank or trust company incorporated under the laws of the United States or of any State or Territory, a substantial part of whose business is the receipt of deposits, sells any bond, debenture, note, or certificate or other evidence of indebtedness issued by any corporation (including one issued by a government or political subdivision thereof), with interest coupons or in registered form, any loss resulting from such sale (except such portion of the loss as does not exceed the amount, if any, by which the adjusted basis of such instrument exceeds the par or face value thereof) shall not be subject to the foregoing limitation and shall not be included in determining the applicability of such limitation to other losses.

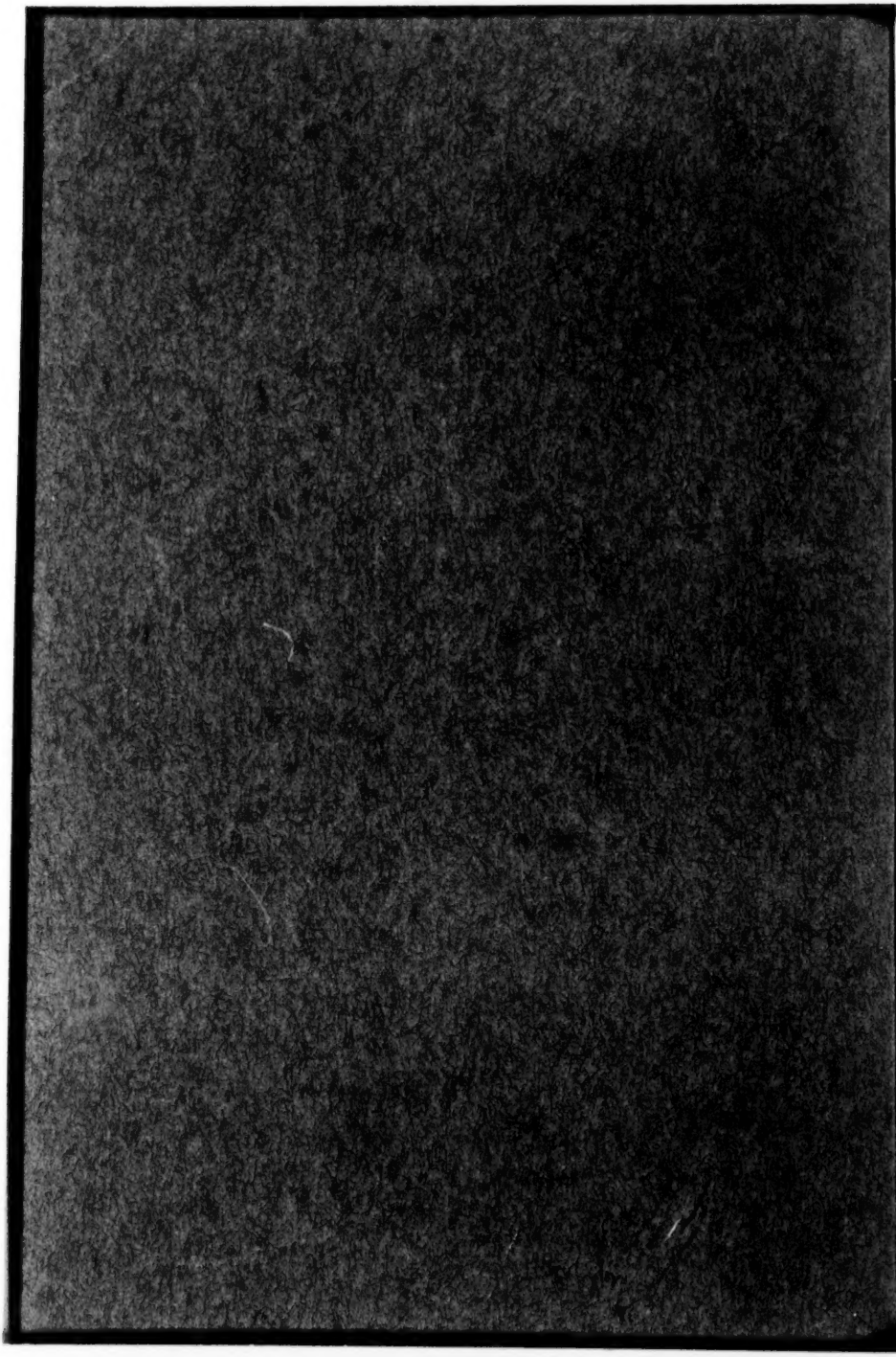
(e) GAINS AND LOSSES FROM SHORT SALES, ETC.—For the purpose of this title—

(1) gains or losses from short sales of property shall be considered as gains or losses from sales or exchanges of capital assets; and

(2) gains or losses attributable to the failure to exercise privileges or options to buy or sell property shall be con-

sidered as gains or losses from sales or exchanges of capital assets held for one year or less.

(f) RETIREMENT OF BONDS, ETC.—For the purposes of this title, amounts received by the holder upon the retirement of bonds, debentures, notes, or certificates or other evidences of indebtedness issued by any corporation (including those issued by a government or political subdivision thereof), with interest coupons or in registered form, shall be considered as amounts received in exchange therefor.



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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 919

THE FIFTH AVENUE BANK OF NEW YORK, AS TRUSTEE, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 9–14) is reported in 41 F. Supp. 428.

JURISDICTION

The judgment of the Court of Claims was entered on November 3, 1941 (R. 14). The petition for a writ of certiorari was filed February 3, 1942 (R. 14). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

After the grantor's death the trustee of a revocable *inter vivos* trust sold certain capital assets which it had acquired prior to the grantor's death. In determining the portion of the gain to be taxed under Section 117 (a) of the Revenue Act of 1934, is the trustee to be treated as having "held" these assets from the date on which the trust acquired them or from the date of the grantor's death?

STATUTE INVOLVED

Section 117 (a) of the Revenue Act of 1934 provides:

> SEC. 117. CAPITAL GAINS AND LOSSES.
>
> (a) *General Rule.*—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income:
>
> 100 per centum if the capital asset has been held for not more than 1 year;
>
> 80 per centum if the capital asset has been held for more than 1 year but not for more than 2 years;
>
> 60 per centum if the capital asset has been held for more than 2 years but not for more than 5 years;
>
> 40 per centum if the capital asset has been held for more than 5 years but not for more than 10 years;
>
> 30 per centum if the capital asset has been held for more than 10 years;
>
> * * * * *

Other pertinent portions of the applicable statute are set forth in the Appendix, *infra*, pp. 8–10.

STATEMENT

The special findings of the Court of Claims (R. 6–8) may be summarized as follows:

On October 28, 1926, Henry Herman Westinghouse transferred certain property to the petitioner and himself as co-trustees to receive, manage, and invest the trust property, to pay the income to the grantor during his life and after his death to his widow for her life and then to distribute the corpus as directed in the trust agreement. The grantor reserved the right, while he lived, to amend or revoke the trust by an instrument in writing. He died on November 18, 1933, without having exercised the power of revocation. (R. 6.)

On October 11, 1927, and November 1, 1929, the grantor transferred certain securities to the trust. Between August 12 and August 27, 1932, the trust purchased certain other securities. During 1934 the petitioner, as trustee, sold both lots of securities.[1] (R. 6–7.)

In an income tax return for 1934 the petitioner took as the basis for determining the gain or loss upon the sale of those securities the value of the securities upon the date of the grantor's death, November 18, 1933. For purposes of determining

[1] At the same time the trustee sold certain other securities acquired by it after the grantor's death. But, since there is no dispute as to the period for which they were "held", this fact may be ignored for present purposes.

the percentage of the gain or loss to be taxed under Section 117 of the Revenue Act of 1934, the petitioner computed the period for which it had "held" these securities as also running from the date of the grantor's death (R. 8). Later, however, the petitioner filed a claim for refund upon the ground that the holding period should have been computed not from the date of grantor's death but from the date of the trustee's acquisition of the securities. The claim for refund was rejected by the Commissioner of Internal Revenue on January 25, 1938 (R. 7–8).

Upon the foregoing facts, the Court of Claims ruled that the holding period for the purpose of computing the capital gain ran from the date of death of the grantor and gave judgment for the United States (R. 8–9).

ARGUMENT

1. Throughout the Revenue Acts runs the concept that the creation of a revocable trust results in so insubstantial and formal a change of ownership as to be ignored for tax purposes, especially where, as here, the grantor also reserves a life estate. The income is taxed as income of the grantor. *E. g.* Revenue Act of 1934, Section 166. If the trustee sells capital assets acquired from the grantor, the basis taken for determining gain or loss is the same as it would have been in the hands of the grantor and the property is treated as having been "held" not for the period during which

title was in the trustee and the trustee had possession of the property, but for the entire period during which either the grantor or the trustee had the property. Sections 113 (a) (3), 117 (c) (2); cf. *Helvering* v. *New York Trust Co.*, 292 U. S. 455. Upon death of the grantor the corpus of the trust is included in his taxable estate. Revenue Act of 1926, Secton 302 (d). And after the death of the grantor, the value of the property at the death is taken as the basis of determining gain or loss upon sales by the trustee. Section 113 (a) (5). These provisions uniformly bear witness to the tax concept stated by the Conference Committee in 1928 when Section 113 (a) (5) was first put into the Revenue Acts (H. Conf. Rep. 1882, 70th Cong., 1st Sess., p. 15 (1939–1 Cum. Bull. (Part 2) 444):

> Thus property acquired by virtue of revocable trusts of the kind described is treated, for all practical purposes, the same as though it had been transmitted by the grantor by will at his death.

Section 117 (a) must be read in this statutory background of interrelated provisions. Petitioner's construction attributes to Congress a curiously capricious inconsistency; there could be no reason for treating either the property conveyed to the trust by the grantor or the property purchased by the trustee during the grantor's life as property "held" by the trustee from the date of acquisition for purposes of computing the holding period and as property of the grantor until his death for every

other tax purpose. On the other hand, the natural meaning of "held" is done no violence by reading it to require more than the holding of a bare legal title subject to the grantor's complete power of revocation; and harmony is brought to the statute by treating such property as "held" by the grantor until his death for this as well as all other purposes. Under these circumstances the Court of Claims was plainly right in preferring the latter interpretation. Cf. *Helvering* v. *New York Co., supra.*

2. The decision of the court below is not in conflict with the decisions of this Court in *McFeely* v. *Commissioner,* 296 U. S. 102, and *Helvering* v. *Gambrill,* 313 U. S. 11. In the *McFeely* case the Court held that under the Revenue Act of 1928 securities acquired by a residuary legatee were "held" by him from the decedent's death regardless of the fact that Section 113 (a) (5) declared that the basis for determining gain or loss should be the value at the date of distribution. In the *Gambrill* case a remainderman had received securities on the termination of a testamentary trust; the Court held that in the case of securities which had belonged to the decedent the holding period began with the date of the death and in the case of securities purchased by the trustees the holding period began with the date of the purchase. Although these decisions show that the date on which the holding period begins does not necessarily coincide with the date as of which the basis for calculating gain or loss is determined, they have no tendency to show that in

enacting Section 117 (a) Congress intended to depart from its general practice of treating property held in a revocable trust as the property of the grantor until his death and thereafter as the property of the beneficiaries. On the contrary, the *McFeely* and *Gambrill* cases destroy the very premise upon which petitioner bases its argument for they show respectively that neither legal title [2] nor possession and a power of management is determinative of who "holds" the property.

3. Although, as petitioner points out (Pet. 6–7), there are a large number of revocable trusts, which might be affected by the question here presented, it does not appear to have assumed any importance for, so far as we can discover, no other trustee has litigated the question.

CONCLUSION

There is no conflict of decisions and no question of general importance. The decision of the court below is correct and the petition should be denied.

Respectfully submitted,

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Assistant Attorney General.
J. LOUIS MONARCH,
ELIZABETH B. DAVIS,
Special Assistants to the Attorney General.

MARCH 1942.

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[2] See 296 U. S. 102, 107–108.

APPENDIX

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

* * * * *

(5) *Property Transmitted at Death.*—If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death. For the purpose of this paragraph property passing without full and adequate consideration under a general power of appointment exercised by will shall be deemed to be property passing from the individual exercising such power by bequest or devise.

* * * * *

(U. S. C., Title 26, Sec. 113.)

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *General Rule.*—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income:

100 per centum if the capital asset has been held for not more than 1 year;

80 per centum if the capital asset has been held for more than 1 year but not for more than 2 years;

60 per centum if the capital asset has been held for more than 2 years but not for more than 5 years;

40 per centum if the capital asset has been held for more than 5 years but not for more than 10 years;

30 per centum if the capital asset has been held for more than 10 years;

(b) *Definition of Capital Assets.*—For the purposes of this title, "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

(c) *Determination of Period for which Held.*—For the purpose of subsection (a)—

(1) In determining the period for which the taxpayer has held property received on an exchange there shall be included the period for which he held the property exchanged, if under the provisions of section 113, the property received has, for the purpose of determining gain or loss from a sale

or exchange, the same basis in whole or in part in his hands as the property exchanged.

(2) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

(3) In determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain was recognized to the distributee under the provisions of section 112 (g) of the Revenue Act of 1928 or the Revenue Act of 1932, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution.

(4) In determining the period for which the taxpayer has held stock or securities the acquisition of which (or the contract or option to acquire which) resulted in the nondeductibility (under section 118 of this Act or section 118 of the Revenue Act of 1928 or the Revenue Act of 1932, relating to wash sales) of the loss from the sale or other disposition of substantially identical stock or securities, there shall be included the period for which he held the stock or securities the loss from the sale or other disposition of which was not deductible.

* * * * *

(U. S. C., Title 26, Sec. 117.)

U. S. GOVERNMENT PRINTING OFFICE: 1942